UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-11237-RWZ

PAUL A. CAMARA

v.

JO ANNE B. BARNHART

MEMORANDUM OF DECISION

December 13, 2005

ZOBEL, D.J.

Plaintiff seeks review of a final decision of the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. § 405(g). Plaintiff has twice applied for Social Security disability benefits. His first application, filed on February 26, 1998, was denied initially and on reconsideration, and was then denied on appeal by the Administrative Law Judge ("ALJ") in a November 30, 1999 decision. Plaintiff did not seek administrative or judicial review of that decision. He next applied for disability benefits in March 2001. After a hearing, the ALJ denied benefits on July 14, 2003, finding that plaintiff was employable and therefore not disabled within the meaning of the Social Security Act. The current appeal arises from that July 14, 2003 decision, which the parties agree is ripe for review. Before the court are plaintiff's motion for summary judgment and defendant's motion for an order affirming the decision of the Commissioner.

The record reveals that plaintiff suffers from a number of long-standing physical and mental maladies. He has had hepatitis A, B, and C and has struggled for a number

of years with diabetes. He has in addition experienced depression, anxiety, a personality disorder, and drug addiction. (R. 26-27). In his July 2003 decision, the ALJ concluded that although "the claimant has suffered from depression, anxiety, a personality disorder and drug addiction . . ., the record fails to demonstrate that [he] has had marked restriction of his daily activities, of his social functioning or of his ability to concentrate and persist at tasks." (R. 31). Thus, while the ALJ found that "the claimant has been incapable of performing his past relevant work," he was, in the ALJ's view, capable of performing "work of a light exertional level" (id.), and therefore was not disabled under the Social Security Act (R. 34). That decision was based on two subsidiary determinations. First, the ALJ decided to discredit certain medical reports in the record, primarily those of plaintiff's treating or examining physicians, while crediting others, primarily those of the agency's non-examining physicians. Specifically, the ALJ discredited the reports of Drs. Rothfarb, Hastings, and Sens, and he incorporated by reference his November 13, 1999 decision in which he discredited the reports of Drs. Greene, Gonzalez, and Kobrin. On the other hand, the ALJ chose to accept the reports of two of the agency's consulting psychologists — Drs. Keuthen and Marks — as well as one statement from the report of Dr. Bard. Second, the ALJ decided that the medical reports he had credited supported a conclusion that plaintiff exhibited a "moderate" rather than "moderately severe" limitation of certain social and occupational abilities. Because the Vocational Expert who testified at plaintiff's hearing found that someone suffering from "moderate" limitations could engage in light exertional work, while someone suffering from "moderately severe" limitations could not work (R. 98-101), the

ALJ's finding that plaintiff suffered only from "moderate" limitations led to the conclusion that plaintiff was employable.

Plaintiff argues that the ALJ's first subsidiary decision — to discredit certain medical opinions while crediting others — was in error, and that his final determination was therefore likewise infected with error. According to plaintiff, "uncontradicted medical evidence" in the record shows that his limitations were "at the very least 'moderately severe.'" (Pl.'s 11/22/04 Mem. at 2). In support of this claim, plaintiff cites the medical reports of Drs. Greene, Kobrin, Gonzalez, Hastings, Rothfarb, Bard, and Sens.[1] To persuade the court that the Commissioner's decision constituted reversible error, plaintiff must show that it was not supported by substantial evidence. See 42 U.S.C. § 405(g). Substantial evidence is "more than a mere scintilla," Richardson v. Perales, 402 U.S. 389, 401 (1971), and it exists "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [the Commissioner's] decision," Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981). "Even in cases where the record can be perceived to support another conclusion, the Commissioner's decision must be upheld if it was supported by substantial evidence." Nguyen v. Callahan, 997 F. Supp. 179, 181 (D. Mass. 1998). Because the ALJ's decision was not supported by substantial evidence, plaintiff's motion is allowed.

[1]Plaintiff also cites a report by Dr. Sobel, which stated that plaintiff "has a great deal of depression." (R. 673). As a statement of this breadth aids neither defendant nor plaintiff, the ALJ's failure to address it was not error.

Before addressing the merits, I first consider a preliminary issue concerning medical reports submitted in a previous adjudication of plaintiff's disability. The ALJ declined to discuss in detail the medical reports of Drs. Greene, Kobrin, and Gonzalez, all of whose opinions he considered and discredited when he considered plaintiff's first application for disability benefits.[2] The Commissioner argues, incorrectly, that the ALJ was not required to consider their opinions because he had already taken them into account at the time of plaintiff's first application, which he denied in a decision that is res judicata. See 20 C.F.R. § 416.1457. Courts have explicitly rejected this reasoning on a number of occasions. "[A]lthough the final judgment denying that [earlier] application was res judicata, this did not render evidence submitted in support of the application inadmissible to establish, though only in combination with later evidence, that [the claimant] had become disabled after the period covered by the first proceeding." Groves v. Apfel, 148 F.3d 809, 810 (7th Cir. 1998). "[E]ven if a doctor's medical observations regarding a claimant's allegations of disability date from earlier, previously adjudicated periods, the doctor's observations are nevertheless relevant to the claimant's medical history and should be considered by the ALJ." Hamlin v. Barnhart, 365 F.3d 1208, 1215 (10th Cir. 2004); see also Frustaglia v. Sec'y of Health & Human Servs., 829 F.2d 192, 193 (1st Cir. 1987) (ALJ is entitled to consider evidence from prior denial at time of second application for limited purpose of reviewing preliminary facts or cumulative medical history).

[2]The same ALJ reviewed both of plaintiff's applications for disability benefits.

Indeed, had the ALJ failed to consider these earlier medical opinions, that alone could constitute grounds for reversal. See Groves, 138 F.3d at 811; Nguyen, 997 F. Supp. at 182. The ALJ, however, did note the inclusion of these prior reports in the record (R. 27), and although he did not discuss them in detail, he "incorporated by reference" his discussion of those reports in his November 30, 1999 decision denying plaintiff's first application for benefits (R. 26 n.3). This was sufficient to satisfy his obligation to evaluate every medical opinion in the record. See 20 C.F.R. § 404.1527. The relevant inquiry, therefore, is whether the reasons given by the ALJ in both of his opinions for crediting or discrediting medical reports is supported by substantial evidence.

As to the opinions of Drs. Greene and Gonzalez, the ALJ was entitled to accord them only minimal weight. Both concluded that plaintiff exhibited serious or marked impairment of his social and occupational functions (Tr. 244, 308), but both also noted that this impairment was a result of plaintiff's longstanding drug abuse. See R. 243-44, 308). The ALJ, exercising his authority to draw inferences, see Nguyen, 997 F. Supp. at 1182, inferred in his November 30, 1999 decision that such drug abuse was "ongoing" and "contributed significantly to symptoms of impaired mental functioning during this period" (R. 360 (emphasis added)). Congress has prohibited a finding of disability where alcoholism or drug addiction would be a material contributing factor to such a finding. See 42 U.S.C. § 1283c(a)(3)(J). Because the ALJ found that drug addiction was a material contributing factor to any symptoms of mental disability observed by Drs. Greene and Gonzalez, he was entitled to give their opinions lesser probative weight.

More troubling, however, is the ALJ's repeated refusal to credit any of the medical reports supporting a finding of disability, while crediting only those reports to the contrary. For example, Dr. Rothfarb examined plaintiff in October 2001, at the request of the Commissioner, and reported that plaintiff had a "major depressive disorder with a history of drug dependence," "pronounced weakness in attention and rote and immediate memory," an inability to "interact appropriately with the general public," and difficulty in maintaining "socially appropriate behavior." (R. 590). He further observed that plaintiff was unable to work in close proximity with others, to complete a normal work day, to respond appropriately to changes, and most likely to get along with coworkers. (R. 590-91). Dr. Rothfarb reported that plaintiff had a Global Assessment of Functioning ("GAF") of 48, which even the ALJ recognized indicated a "marked impairment of social and occupational functioning. (R. 32) Dr. Rothfarb therefore concluded that plaintiff had "at least moderate difficulties in maintaining effective and appropriate social functioning." (Id.) Because Dr. Rothfarb was an examining physician, his opinion was entitled to "more weight" than those of the non-examining physicians whom the ALJ did credit. See 20 C.F.R. § 404.1527(d)(1). Nevertheless, the ALJ assigned this report only minimal probative weight, claiming it was internally inconsistent. (R. 32). Specifically, the ALJ wrote that while Dr. Rothfarb had noted several marked impairments in plaintiff's functioning throughout his report, he later stated that plaintiff showed only mild to moderate restrictions in daily living activities and "at least moderate" difficulties in maintaining effective and appropriate social functioning. (Id.).

As plaintiff points out, however, it was not inconsistent for Dr. Rothfarb to find that plaintiff's limitations in daily living activities were only moderate, while plaintiff's limitations in social and occupational functioning were more severe. Nor was it inconsistent for Dr. Rothfarb to describe plaintiff's limitations in social and occupational functioning as severe or marked at certain points in his report, while labeling it "at least moderate" in his conclusion. The phrase "at least moderate" sets a floor; it therefore is entirely consistent with earlier statements indicating that plaintiff's limitations were more than moderate. In short, Dr. Rothfarb's analysis was not internally inconsistent, and the ALJ's decision to discredit it was therefore not supported by substantial evidence.

Similarly, Dr. Hastings reported in May 2001 that plaintiff suffered from a "depressive illness of long-standing complicated by his lack of adequate academic credentials, incarceration for drug use and his medical condition which seems to be deteriorated." (R. 533-34). He found that plaintiff had a recurrent, "major depressive disorder." (R. 534). And while he noted that plaintiff had a substance abuse disorder, he found that it was "in remission." (Id.). He assigned plaintiff a GAF of 40, which the ALJ recognized was associated with "marked to extreme impairment of social and occupational functioning." (R. 31-32). However, the ALJ decided to disregard Dr. Hastings's assessment for three reasons: (1) "said assessment was made a short time following [plaintiff's] release from prison"; (2) it was made "during a period [when] he was not receiving any ongoing psychiatric treatment"; and (3) it "is inconsistent with the record as a whole." (R. 32). Again, the ALJ's reasoning is unpersuasive. Dr. Hastings's assessment is inconsistent with the record only because the ALJ had discredited other medical evaluations indicating plaintiff suffered from a mental

disability. Likewise unconvincing is the ALJ's reference to plaintiff's recent incarceration; plaintiff has been incarcerated for much of his life — a fact that all of the evaluating doctors mentioned in their reports and that therefore failed to provide the ALJ with a basis for disregarding only Dr. Hastings's opinion.

Furthermore, while the ALJ accepted Dr. Bard's statement in his December 2001 report that plaintiff suffered from moderate impairment of social and occupational functioning (R. 31), the ALJ failed to discuss Dr. Bard's finding that plaintiff had "marked restrictions in his activities of daily life and marked difficulties in maintaining appropriate social functioning." (R. 682). The Commissioner correctly notes that it was the ALJ's prerogative to resolve this inconsistency (Def.'s 2/14/05 Mem., at 14), see Delsie v. Shalala, 842 F. Supp. 31, 33 (D. Mass. 1994), but the Commissioner's arguments are not evidence of record and do not substitute for findings by the ALJ, see Martinez v. Comm'r of Soc. Security, 306 F. Supp. 2d 98, 99 (D.P.R. 2004). Nowhere did the ALJ state that he was disregarding those earlier statements because they were inconsistent with the Commissioner's later statement; in fact, he did not mention the statements indicating marked limitations at all. If the record unambiguously indicated no disability, then the ALJ's failure to discuss Dr. Bard's contrary findings might be overlooked as an inference properly drawn, or an inconsistency fairly resolved. See Delsie, 842 F. Supp. at 33. But much of the evidence in the record supports a finding of disability; indeed, the ALJ's finding of no disability was reached only after he had discredited seven physicians' opinions. In that light, the ALJ's decision to ignore the bulk of Dr. Bard's report and to credit only that statement supporting a finding of no disability is rendered suspect. Cf. Groves, 138 F.3d at 811 ("[T]he failure so much as to mention the

competent medical evidence that went contrary to [the credited opinion] made the administrative law judge's explanation for his decision to deny benefits unacceptable."). The ALJ's failure to mention contrary evidence in Dr. Bard's report is particularly telling, given the ALJ's emphasis on an alleged inconsistency in the report of Dr. Hastings. Thus, although the Commissioner offers an explanation for the ALJ's silence as to Dr. Bard's contrary conclusions, that proffer cannot redeem the ALJ's failure to do so himself. See Martinez, 306 F. Supp. 2d at 99 (ALJ's failure to indicate reasons for rejecting opinion of treating physician was grounds for remand, even though Commissioner offered such reasons in its brief).

As for Drs. Kobrin and Sens — both of whom treated plaintiff for extended periods of time, and both of whom noted marked, severe, or extreme limitations in plaintiff's social and occupational functioning — the ALJ chose to discredit their opinions because neither report was supported by clinical findings or significant mental status examination findings. (R. 28, 360). It is true that the opinions of treating physicians are not entitled to controlling weight unless "well-supported by medically acceptable clinical and laboratory diagnostic techniques," 20 C.F.R. § 404.1527(d)(2), and the First Circuit has "repeatedly refused to adopt a per se rule" giving the opinions of treating physicians greater weight than those of the agency's consulting physicians, Tremblay v. Sec'y of Health & Human Servs., 676 F.2d 11 (1st Cir. 1982). Nevertheless, a treating physician's opinion, even if not accorded controlling weight, is still generally entitled to "more weight . . ., since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s)." 20 C.F.R. § 404.1527(d)(2). Thus, "[w]hen an ALJ rejects a treating physician's opinion,

he must articulate specific, legitimate reasons for his decision." Hamlin, 365 F.3d at 1215 (internal quotation marks omitted). Here, the reason given was the lack of supporting findings or notes. But the reports of the agency physicians to which the ALJ did give probative weight — Drs. Keuthen and Marks — were similarly devoid of extensive medical findings. This fact undermines the ALJ's sole reason for discrediting the reports of Drs. Kobrin and Sens.

Finally, the ALJ wrote that all of the diagnoses in the record noted plaintiff's problems with substance abuse, and that "none of these diagnoses is a reliable source of evidence for the claimant's impairment in the absence of substance abuse." (R. 32). Such a sweeping exclusion, however, is surely too broad. As noted above, where alcoholism or drug addiction is a material contributing factor to a finding of disability, an individual may not be considered disabled. See 42 U.S.C. § 1382c(a)(3)(J). But in cases where drug addiction is not a material contributing factor, a finding of disability is not prohibited. At least one doctor — Dr. Hastings — assigned plaintiff a GAF of 40, indicating marked to extreme impairment of social and occupational functioning, at a time when plaintiff's substance abuse disorder was in remission. (R. 533-34). The ALJ's decision to disregard all of the medical reports based on plaintiff's drug abuse was thus too broad. Indeed, the Commissioner's own regulations provide that addiction "will not, by itself, be a basis for determining whether you are, or are not, disabled," 20 C.F.R. § 416.925(e), a rule that would seem to bar the ALJ from unilaterally disregarding all medical reports that mention substance abuse. Accordingly, the fact that all of the medical assessments in plaintiff's record reported past or current drug use would not alone automatically require a finding of no disability.

Each of the ALJ's individual decisions to discredit certain medical reports might, if viewed independently, have satisfied the substantial evidence standard. But the record is examined as a whole, "including whatever in the record fairly detracts from the weight of the Secretary's decision." Rohrberg v, Apfel, 26 F. Supp. 2d 303, 306 (D. Mass. 1998) (internal quotation marks omitted). Here, the ALJ discredited each of the medical reports contained in the record that supported a finding of disability, while giving significant probative weight only to reports conducted by non-examining agency physicians who concluded that plaintiff was not disabled and was employable. Indeed, review of the record indicates that the medical opinions that the ALJ chose to disregard provided generally consistent descriptions of plaintiff's social and occupational limitations, and consistently rated his GAF between 40 and 50. While a GAF score is not the sole factor to be taken into account by the ALJ, repeated reports of a GAF score in the 40-50 range, a range generally associated with an inability to hold a job, should have been given fuller consideration by the ALJ. In addition, the ALJ failed to provide legitimate reasons for disregarding the opinions of Drs. Rothfarb and Hastings, or that portion of Dr. Bard's report supporting a finding of disability. While I recognize that plaintiff's long-term drug use complicates the assessment of his level of impairment, and while on remand it is entirely possible that the ALJ will find sound reasons to affirm his previous findings of employability, the record before me does not provide substantial evidence to support the Commissioner's decision.

Accordingly, plaintiff's motion for summary judgment (#8 on the docket) is allowed and the case is remanded for further proceedings consistent with this opinion.

Defendant's motion for order affirming the decision of the Commissioner (#11 on the docket) is denied.

DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE